

Before the  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Berkeley Main Post Office  
Berkeley, California

Docket No. A2013-9

Public Representative's Answer to the  
Postal Service's Motion to Dismiss Proceedings

(August 16, 2013)

Pursuant to Rule 21(b) of the Commission's Rules, 39 C.F.R. § 3001.21(b), the Public Representative hereby responds to the Postal Service's motion to dismiss the appeal of its final determination regarding the relocation of retail services in Berkeley, California.<sup>1</sup>

I. BACKGROUND

On April 19, 2013, the Postal Service announced its decision to relocate the retail services of the Berkeley (MPO).<sup>2</sup> Concerned parties filed requests for review with the Postal Service. On July 18, 2013, the Postal Service issued its Final Determination. *Id.* In the Final Determination, the Postal Service indicates that it intends to undertake a site selection process in order to relocate the post office, or to complete a sale and lease-back transaction so as to allow retail services to remain in place. *Id.* at 2. The Postal Service acknowledges the history of the Berkeley post office, but contends that it is no longer practical to retain ownership of the property since operations require only 4,000 of the 57,000 square feet of space in the building. *Id.* at 3. The Postal Service

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<sup>1</sup> Motion of United States Postal Service to Dismiss Proceedings, August 9, 2013 (Motion to Dismiss).

<sup>2</sup> See *id.*, Exhibit 1, at 1 (Final Determination).

indicates that it will retain ownership of a mural located within the building and that it will ensure that the mural is preserved and that public access to it is maintained. *Id.* at 2. The Postal Service classifies the proposed transaction as a relocation, rather than a closure or consolidation of the post office. *Id.* at 3. It has therefore followed its relocation procedures, which are provided at 39 C.F.R. § 241.4, rather than the closure or consolidation procedures provided at 39 C.F.R. § 241.3. The Postal Service concludes that “there is no right to further administrative or judicial review” of the Final Determination. *Id.* at 4.

On July 31, 2013, Tom Bates, the Mayor of the City of Berkeley (Petitioner), filed a petition with the Commission appealing the Final Determination.<sup>3</sup> Petitioner contends that the proposed sale of the Berkeley MPO building is not a “relocation” of services. Petition at 1. He states that the Postal Service has not identified a place to relocate to, that there is no suitable alternative location within the Berkeley MPO’s zip code, and therefore that a sale and lease-back option is a likely outcome. *Id.* Petitioner asserts that the proposed sale comes under the purview of the Commission. If the Postal Service intends to relocate the Berkeley MPO, Petitioner contends that it should secure an alternative site before putting the current building up for sale. *Id.*

On August 1, 2013, the Commission instituted this proceeding pursuant to 39 U.S.C. § 404(d)(5), the statutory provision governing appeals of post office closures or consolidations.<sup>4</sup> The Commission established August 12, 2013 as the deadline for the Postal Service to file the applicable Administrative Record and any responsive pleading, and September 3, 2013 as the deadline for Petitioner to submit arguments supporting the appeal. On August 2, 2013, the Commission provided Petitioner with a copy of Commission Form 61.<sup>5</sup>

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<sup>3</sup> Letter from Tom Bates, Mayor, to Chairwoman Ruth Y. Goldway, July 26, 2013 (Petition). The Petition is dated July 26, 2013 and was filed with the Commission on July 31, 2013.

<sup>4</sup> Notice and Order Accepting Appeal and Establishing Procedural Schedule, August 1, 2013 (Order No. 1795).

<sup>5</sup> Letter from Ruth Ann Abrams, Acting Secretary to the Honorable Tom Bates, August 2, 2013.

## II. THE MOTION TO DISMISS

The Postal Service filed its Motion to Dismiss on August 9, 2013. The Postal Service states that it will relocate the post office to location, yet to be determined, close to the current Berkeley MPO. Motion to Dismiss at 1. It indicates that it will only consider alternative locations that are convenient and located with the same zip code. *Id.* at 3. The Postal Service asserts that it will provide the same services and the same hours of service at the alternative location. *Id.* The Postal Service will continue to operate the Berkeley MPO until the alternative location is ready for use. *Id.*

The Postal Service contends that because it is relocating the Berkeley MPO, Petitioner's appeal falls outside the scope of 39 U.S.C. § 404(d)(5). *Id.* at 1. The Postal Service cites a series of Commission orders holding that section 404(d)(5) applies to closures and discontinuances but not relocations of post offices. *Id.* at 2-7. The Postal Service concludes that the Commission "lacks jurisdiction" and therefore "should dismiss the appeal." *Id.* at 8.

On August 15, 2013, the Petitioner filed an answer to the Motion to Dismiss.<sup>6</sup> Petitioner contends that because the Postal Service is moving forward with plans to sell the post office building, and because the Postal Service has no specific relocation plan in place, the sale of the post office building constitutes a closure or consolidation under section 404(d) and the Commission therefore has jurisdiction over this appeal. Answer at 1-2.

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<sup>6</sup> Petitioner's Reply to United States Post Office Motion to Dismiss Proceedings, August 15, 2013 (Answer).

### III. DISCUSSION

#### A. The Appeal is not Ripe for Commission Review

When the Postal Service decides to “close or consolidate” a post office, the determination to do so “may be appealed by any person served by such office to the Postal Regulatory Commission. . .” 39 U.S.C. § 404(d)(5). In its Motion to Dismiss, the Postal Service contends that section 404(d)(5) does not apply because the appeal concerns the “relocation” of a post office rather than the closure or consolidation of a post office. Motion to Dismiss at 1. However, in the Final Determination, the Postal Service indicates that it has not yet determined whether it will relocate the post office or pursue a sale and lease-back transaction. *Id.* at 2. Because a sale and lease-back transaction is still an option, and because no alternative post office location has been identified, it is premature to characterize the planned sale of the Berkeley MPO building as a “relocation.” Relocation is merely a possibility at this point.

Whether the sale of the building constitutes a post office closing or merely a relocation matters for purposes of this appeal. While the Commission has jurisdiction to hear an appeal of a determination to “close” or to “consolidate” a post office, a long line of Commission precedent holds that this jurisdiction does not extend to an appeal of a determination to “relocate” retail postal operations from one facility to another within the community.<sup>7</sup>

The Commission’s recent decision in the appeal concerning the Bronx general post office (GPO) provides a useful framework for analyzing this appeal. Like the

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<sup>7</sup> See Docket No. A2013-1, Order Granting Motion to Dismiss, December 19, 2012 (Order No. 1588); Docket No. A2012-17, Order Granting Motion to Dismiss, January 24, 2012 (Order No. 1166); Docket No. A2011-21, Order Granting Motion to Dismiss, August 15, 2011 (Order No. 804); Docket No. A2010-2, Order Dismissing Appeal, April 27, 2010 (Order No. 448); Docket No. A2007-1, Order Dismissing Appeal on Jurisdictional Grounds, October 9, 2007 (Order No. 37); Docket No. A86-13, Order Dismissing Docket No. A86-13, June 10, 1986 (Order No. 696); Docket No. A82-10, Order Dismissing Docket No. A82-10, June 25, 1982 (Order No. 436)..

Berkeley MPO, the Bronx GPO is listed in the National Register of Historic Places.<sup>8</sup> The Postal Service intends to relocate the post office located in the landmark Bronx GPO to an alternative location that is yet to be determined. Order No. 1802 at 2. The Postal Service assures customers of both the Bronx and the Berkeley post offices that it will only consider replacement facilities that are convenient and suitable to customers. *Id.* And it indicates that it will continue to provide service at each of the landmark locations until each of the respective alternative location is ready for use. *Id.* The Postal Service assures customers of both post offices that, when it moves to the alternative location, it will provide the same services and the same hours of operation. *Id.* Petitioners appealed the Postal Service's decision to sell the building housing the Bronx GPO.<sup>9</sup> The Postal Service filed a motion to dismiss the appeal of its decision to relocate the Bronx GPO on the same basis that it proposes to dismiss the instant appeal, namely because the appeal concerns a "relocation" over which the Commission has no jurisdiction.<sup>10</sup>

The Commission granted the Postal Service's motion to dismiss and dismissed the petitioners' appeals without prejudice. Order No. 1802 at 5. The Commission noted that information concerning when the Bronx GPO would close and where the replacement facility would be located was lacking. *Id.* at 4. Such information, the Commission observed, would be "relevant in determining whether the Postal Service's actions represent a relocation or closing." *Id.* While future events could make a cessation of retail operations at the Bronx GPO ripe for Commission review, the Commission concluded that the Postal Service's actions were "insufficient to trigger the right to appeal at this time." *Id.* at 3.

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<sup>8</sup> See Docket No. A2013-6, Order Granting Motion to Dismiss, August 8, 2013, at 2 (Order No. 1802).

<sup>9</sup> See Docket No. A2013-6, Notice and Order Accepting Appeal and Establishing Procedural Schedule, July 10, 2013, at 1 (Order No. 1776).

<sup>10</sup> Docket No. A2013-6, Motion of the United States Postal Service to Dismiss Proceedings, July 18, 2013, at 1.

For the same reason, the Commission should dismiss the instant appeal without prejudice. Section 404(d)(5) provides a right to appeal a final determination by the Postal Service to close or consolidate a post office. The Postal Service has not indicated (1) when retail operations at the landmark Berkeley MPO building will cease, (2) where the replacement facility will be located, or (3) even whether the post office will be relocated at all. While future events could make the planned cessation of retail operations at the Berkeley MPO ripe for Commission review, the Postal Service's actions are insufficient to trigger the right to appeal at this time.

Petitioner contends that because the Postal Service is forging ahead with its plan to sell the historic Berkeley MPO building without any guarantee that relocation will occur, the Postal Service has determined to close or consolidate a facility for purposes of section 404(d). Bates Answer at 1-2. For the Petitioner to be correct in this assertion, the Commission would need to assume a fact that is not in the record, namely that the Postal Service will not succeed in its stated intention to relocate the Berkeley MPO or to complete a sale and lease-back transaction. The Postal Service indicates that it intends to relocate to an alternative facility or to sell and lease-back the current building. The Commission should not assume that the Postal Service will be unsuccessful in these endeavors.

#### B. Procedure for Selling a Landmark Building

Section 401(5) permits the Postal Service to:

acquire, in any lawful manner, such personal or real property, or any interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease, or otherwise dispose of such property or any interest therein; and to provide services in connection therewith and charges therefor;

39 U.S.C. § 401(5).

Petitioner and the Postal Service dispute whether the Postal Service should be permitted to sell the landmark building.<sup>11</sup> Petition at 1. They also disagree as to whether the Postal Service gave sufficient consideration to the impact that the sale will have on the community and whether the Postal Service conducted a proper financial analysis in deciding to sell the building. Answer at 2-3.

In its Final Determination, the Postal Service indicates that it requires only 4,000 of the 57,000 square feet in the landmark building. Final Determination at 3. The Postal Service states that its financial analysis supports “the relocation of retail services, with a potential sale of the property, as the best alternative.” *Id.* It concludes that “the concerns expressed do not outweigh the dire financial circumstances facing the Postal Service.” *Id.* at 4. The Postal Service indicates that it will comply with Section 106 of the National Historical Preservation Act, 16 U.S.C. § 470f. *Id.* at 2. It also states that it will retain ownership of the mural inside the building, ensure that the mural is preserved, and ensure that the public access has access to it. Final Determination at 2.

The Final Determination does not provide the details of the financial analysis that the Postal Service conducted. Petitioner states that the City Council has “repeatedly reached out to the Postal Service asking them to release the cost-benefit analysis used to sell the Berkeley MPO and to justify their decision to relocate retail service *and* sell the building.” Answer at 2. Petitioner contends that the Postal Service should be “required to go through a proper discontinuance procedure.” *Id.*

When the Postal Service decides to close or consolidate a post office, section 404(d) provides detailed regulations for how it may go about doing so. The Postal Service is required, for example to consider the effect that closure will have on the community and on Postal Service employees, and the economic savings that will result

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<sup>11</sup> The building also contains historic mural. A photograph of the mural, “Incidents in California History,” can be viewed at the Living New Deal website <http://livingnewdeal.berkeley.edu/projects/berkeley-main-post-office-incidents-in-california-history-berkeley-ca/> (visited August 16, 2013).

from the closing. 39 U.S.C. § 404(d)(2). When the Postal Service decides to sell property, even landmark property with significant cultural value, no provision of title 39 requires the Postal Service take specific considerations into account. The Postal Service is free to provide the community with a better explanation as to how it accounted for the effects that the sale of the landmark building will have on the community and how its financial analysis led it to conclude that selling the landmark building is the best alternative, but title 39 does not require that it do so.

#### IV. CONCLUSION

For the reasons stated above, the Commission should grant the Motion to Dismiss without prejudice.

Respectfully Submitted,

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